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NO. 80-84

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ANDERSON BROS. FORD and
FORD MOTOR CREDIT COMPANY,

Petitioners,

-v-

OLGA VALENCIA and
MIGUEL GONZALEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent Olga Valencia moves for leave to proceed in forma pauperis pursuant to Supreme Court Rule 46.

The affidavit of the respondent in support of this motion is attached hereto.

Respectfully submitted,

Alan A Alop

ALAN A. ALOP

18th Street Office - Legal
Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, IL 60608
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A F F I D A V I T

STATE OF ILLINOIS)
) ss
COUNTY OF C O O K)

I, OLGA VALENCIA, being first duly sworn depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in this cause without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are are presently employed?

Yes. Transo-Envelope Company, 3542 North Kimball Avenue,

Chicago, Illinois. Approximately $525.00 monthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

Savings Account of $300.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

1973 Chevrolet Caprice - value approximately $500.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Husband (unemployed) and two children.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Olga A. Valencia
OLGA VALENCIA

SWORN and SUBSCRIBED to
before me this 18th day
of September, A.D., 1980.

Martha G. Alanis
NOTARY PUBLIC

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RULE 28.2 AFFIDAVIT

STATE OF ILLINOIS)
) ss
COUNTY OF C O O K)

ALAN A. ALOP, attorney for the respondents, being first duly sworn, deposes and states:

1. He is a member of the Bar of this Court.

2. That on September 22, 1980, he personally deposited in a United States mailbox located at the corner of Loomis and Eighteenth Streets, Chicago, Illinois, with first-class postage prepaid, ten copies of the respondents' Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and a Motion for Leave to Proceed In Forma Pauperis.

3. That said documents were addressed to:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Alan A Alop

ALAN A. ALOP
One of the Attorneys for Petitioners

SWORN and SUBSCRIBED to
before me this 23rd day
of September, A.D., 1980.

Notary Public

NOTARY PUBLIC

CERTIFICATE OF SERVICE

The undersigned states that a copy of the foregoing and the Brief in Opposition to the Petition for Writ of Certiorari and the Motion for Leave to Proceed in forma pauperis were served upon Aaron J. Kramer, Schiff, Hardin & Waite, 7200 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606 on this 23rd day of September, A.D., 1980 by U.S. mail.

Alan A Alop

Supreme Court, U.S.
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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the current Truth in Lending Act and Regulation Z require disclosure of a creditor's security interest in returned or unearned physical damage insurance premiums?

2. Whether the factors in Chevron Oil Co. v. Huson would require abandoning the general rule of retroactive application of a decision?

3. Whether a counterclaim raising substantially different issues of law and fact was properly found permissive and dismissed by the Seventh Circuit for lack of jurisdiction?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii-
Table of Authorities	iv-vii
Statement of Facts	1
Reasons why the Writ should Be Denied	2
1. THE DECISION BELOW WILL HAVE A LIMITED EFFECT DUE TO THE RECENT AMENDMENT OF THE TRUTH IN LENDING ACT	2
2. THE CURRENT REGULATION Z DEFINITION OF "SECURITY INTEREST" COMPELS THE FINDING THAT A CREDITOR'S INTEREST IN RETURNED OR UNEARNED PHYSICAL DAMAGE PREMIUMS IS A TILA SECURITY INTEREST	4
3. THE TENTH CIRCUIT DECISION IN JAMES V. FORD MOTOR CREDIT COMPANY IS ERRONEOUS	5
4. LIMITING THE DECISION BELOW TO PROSPECTIVE APPLICATION ONLY IS UNWARRANTED	7
A. A Decision For Respondents In This Case Was Clearly Foreshadowed	7
B. Limiting This Decision To Prospective Application Will Frustrate The Operation Of the Truth in Lending Act	9
C. No Substantial Inequitable Results Would Occur If This Decision Is Given Normal Application	9
5. UNDER THE FACTS OF THIS CASE THERE IS NO SPLIT IN THE CIRCUITS ON THE APPLICATION OF RULE 13(a) BECAUSE RESPONDENTS" TILA COMPLAINT AND FORD CREDIT'S DEBT COLLECTION COUNTERCLAIM INVOLVE DIFFERENT ISSUES OF FACT AND LAW AND ARE SUPPORTED OR REFUTED BY COMPLETELY DIFFERENT EVIDENCE. THEREFORE, THE COUNTERCLAIM IS NOT COMPULSORY AND WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION	11
A. The Purpose And Test Of Rule 13(a)	11
B. The Facts Of This Case Show That There Is No Logical Relationship Between The Respondents' Complaint And Ford Credit's Counterclaim And Judicial Economy Would Not Be Served by Trying The State Law Counterclaim With The Federal Claim	12
C. When The Facts Of The Case Involving The Issue Of Compulsory Counterclaims Are Considered, There Is No Split Among The Circuits	14

Page

D. The Effect Of A State Law Issue Of First Impression In The Counterclaim 16

E. Dismissal Of The Counterclaim Is Not Unfair To Ford Credit 17

Conclusion 19

Appendix

Opinion of the Court of Appeals for Eighth Circuit (August 28, 1980) A.1

Opinion of the Court of Appeals for the Tenth Circuit (July 21, 1980) A.14

Ford Motor Credit Company form contract dated January 28, 1980 ..... A.16

TABLE OF AUTHORITIES

Cases

	Page
Basham v. Finance America, Corp., 583 F.2d 918 (7th Cir. 1978)	16
Beach v. KDI Corporation, 490 F.2d 1312 (3d Cir. 1974)	11
Brown, v. Termplan, Inc., 459 F. Supp. 160 (N.D.Ga. 1978)	9
Bulger v. Thorpe Credit Inc. of Illinois, 609 F.2d 1255 (7th Cir. 1979)	8
Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1977)	15
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	7-11
DeLaRama S.S. Co. v. U.S., 344 U.S. 386 (1953)	6
Edmondson v. Allen-Russell Ford., Inc., 577 F.2d 291 (5th Cir. 1978), cert. denied, 99 S.Ct. 2180 (1979)	2,4,7,8,9
Ford Motor Credit Company v. Milhollin, __U.S.__. 100 S.Ct. 790 (1980)	8
Gammons v. Domestic Loans of Winston-Salem, Inc., 423 F. Supp. 819 (M.D. N.C. 1976)	15
Gennuso v. Commercial Bank & Trust Co., 425 F. Supp. 461 (W.D. Pa. 1976), rev'd 566 F.2d 437 (3d Cir. 1977)	2,4,7,8
Great Lakes Rubber Corp. v. Herbert Cooper, Inc., 286 F.2d 631 (3rd Cir. 1961)	11
James v. Ford Motor Credit Company, No. 78-1806 (10th Cir. June 24, 1980)	2,5,6
Martin v. Commercial Securities Co., 539 F.2d 521 (5th Cir. 1976)	10
McDaniel v. Fulton National Bank, 571 F.2d 948 (5th Cir. 1978)	10
McMillen v. Blazer Financial Services, Pov. L. Rep. ¶22,720 (N.D. Ga. 1976)	15
Moore v. New York Cotton Exchange, 270 U.S. 593 (1926)	11
Murphy v. Ford Motor Credit Co., No. 79-1822 (8th Cir. August 28, 1980)	2,6,8,10

Page

Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) 11

Plant v. Blazer Financial Services, Inc. of Ga., 598 F.2d 1357 (5th Cir. 1979) 16

Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941) 17

Shanks v. Greenbriar Dodge, Inc., 577 F.2d 296 (5th Cir. 1978) 7

Southern Construction Co. v. Pickard, 371 U.S. 57 (1962) 11

Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419 (5th Cir. 1978) 15,16

Travis v. Trust Company Bank, 621 F.2 148 (5th Cir. 1980) 9,10

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 17

STATUTES

1 U.S.C. §109 6

15 U.S.C. §1601 et seq. ..... passim

15 U.S.C. §1640(e) 4,9

Truth in Lending Simplification and Reform Act, P.L. 96-221, 94 Stat. 168 3

Ill.Rev.Stat. ch. 26, §2-608 1

Ill.Rev.Stat. ch. 26, §9-501 12

Ill.Rev.Stat. ch. 26, §9-504 13

Ill.Rev.Stat. ch. 26, §9-507 18

Ill.Rev.Stat. ch. 121-1/2, §571 13

Ill.Rev.Stat. ch. 121-1/2, §578 13

Rules, Regulations and Interpretations

Federal Rules of Civil Procedure, Rule 13(a) 11

12 C.F.R. §226.2(gg) 3

Revised Regulation Z, §226.2(bb), CCH Cons. Cred. Guide Report No. 304 (May 5, 1980) 3

Page

Federal Reserve Board Staff Opinion No. 377, [1969-77 Sp. Rel. Binder] Cons. Cred. Guide [CCH] Par. 30, 555 (July 22, 1970) 8

Congressional Materials

S. Rep. No. 96-73, 96th Cong. 1st Sess. 17 (1979) 3

S. Rep. No. 96-368, 96th Cong. 1st Sess. (1979) 5

Other

Wright and Miller, 6 Federal Practice and Procedure Civil 1410 (1971) 14

STATEMENT OF FACTS

The respondent Olga Valencia purchased a used 1974 Ford Pinto from Anderson Ford on September 30, 1977. Respondent Miguel Gonzalez, the brother-in-law of Olga Valencia, co-signed for this purchase. The transaction was evidenced by a retail installment contract which was simultaneously assigned to Ford Motor Credit Company ("Ford Credit"). The price of the automobile was $2340.00 plus a finance charge of $319.84. Respondent Valencia paid Anderson Ford $1000.00 downpayment, with the balance payable in 24 installments at a rate of interest of 21.40%.

Approximately three days after Valencia purchased the automobile, she returned it to Anderson Ford and requested that it repair the mechanical defects in the automobile which included, but were not limited to, defective shock absorbers and transmission problems. On or about October 13, 1977, Anderson Ford returned the automobile to Valencia. The mechanical defects in the car were still not reasonably repaired and the following day, October 14, 1977, Valencia again returned the automobile to Anderson Ford and orally revoked acceptance. On December 2, 1977, Valencia notified Anderson Ford in writing that she was revoking the acceptance of the 1974 Pinto pursuant to Ill.Rev. Stat. ch. 26, §2-608.

Despite Valencia's returning the automobile and revoking acceptance on October 14, 1977, prior to the due date of the first payment, Ford Credit took no action on the debt or the revocation until early in March of 1978 when it notified Valencia that it intended to apply for a repossession title from the Secretary of State. On March 7, 1978, the plaintiffs submitted affidavits of defense to the defendants objecting to the involuntary transfer of title and issuance

of a repossession certificate of title by the Secretary of State.[1] Ford Credit did not seek a court order to obtain title to the vehicle until June 9, 1978, three months after it received respondents' affidavits of defense. Respondents possessed the auto for a total of four days for which they paid $1000.00 which has never been returned. The Seventh Circuit affirmed the judgment for respondents on their Truth-in-Lending Act ("TILA") claim, in the amount of $1279.36 statutory damages.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW WILL HAVE A LIMITED EFFECT DUE TO THE RECENT AMENDMENT OF THE TRUTH IN LENDING ACT.

The ruling in the case below comports with the decisions of three other Circuit Courts of Appeal, holding that the current Truth in Lending Act and Regulation Z require disclosure of a creditor's security interest in returned or unearned physical damages insurance premiums. Murphy v. Ford Motor Credit Company, No. 79-1822 (8th Cir. August 28, 1980) (A. 1-13); Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291 (5th Cir. 1978), cert. denied, 441 U.S. 951 (1979);[2] Gennuso v. Commercial Bank and Trust Co., 566 F.2d 437 (3rd Cir. 1977).[3]

1/ Throughout this litigation the respondents have consistently notified Ford Credit that having revoked acceptance of the automobile they are willing to voluntarily assign the title to Ford Credit or Anderson Ford and allow them to dispose of the automobile in any way they choose. Ford Credit, however, insists upon treating their regaining possession of the automobile as a repossession and is suing for the balance on the contract. Respondents filed the affidavit of defense solely to Ford Credit's right to obtain a repossession title.

2/ In Edmondson this Court denied certiorari to Ford Motor Credit Company, one of the petitioners in this cause, regarding the identical issue presented in the instant case.

3/ Cf. James v. Ford Motor Credit Company, No. 78-1806 (10th Cir. June 24, 1980) (rehearing denied, July 21, 1980; (A. 14-15).

On March 31, 1980, the Truth in Lending Simplification and Reform Act ("Simplification Act"). P.L. 96-221, 94 Stat. 168 (1980) was signed into law. The Simplification Act is effective April 1, 1982, and requires the Board of Governors of the Federal Reserve System to promulgate revised regulations by April 1, 1981. P.L. 96-221, Section 625.[4/]

The recent enactment of the Simplification Act and the promulgation of new rules thereunder will of necessity greatly narrow the application of the decision in this case. The amendments are designed to provide "the consumer with simpler, more understandable information . . ." and to make "compliance easier for creditors . . ." S. Rep. No. 96-73, 96th Cong. 1st Sess. 17 (1979). The petitioners argue that the Simplification Act amendments would not require the disclosure, as a security interest, of the creditor's interest in returned or unearned insurance premiums. Pet. at 12. The Seventh Circuit based its ruling on the Regulation Z definition of "security interest" in effect at the time of the pertinent credit transaction and held this disclosure required. (Pet. A. 8-12). The decision was wholly premised on the definition of "security interest" contained in Regulation Z, 12 C.F.R. §226.2(gg). Since the proposed revision of Regulation Z sets out a markedly different definition of "security interest"[5/], the effect of the ruling below will be brief; it will only govern credit transactions entered

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4/ Pursuant to this provision the Board has issued "Revised Truth in Lending Regulation Z", Cons. Credit Guide (CCH) Report No. 304 (May 5, 1980); the public comment period expired July 31, 1980.

5/ "Security interest or security means an interest in property that secures performance of a consumer credit or lease obligation and that is recognized by and enforcible under state law." §226.2(bb) Revised Truth in Lending Regulation Z, CCH Cons. Credt. Guide Report No. 304 (May 5, 1980) (footnote omitted). Cf. Regulation Z, 12 C.F.R. §226.2(gg).

into prior to the imminent implementation of the new regulations, and less than one year ago as a result of the short TILA limitations period. 15 U.S.C. §1640(e).

The impact of the decision below on the credit industry and petitioners is slight. Even before the decision of the Seventh Circuit in this case was announced, Ford Credit had "prepared and distributed to its branch office throughout Illinois a new form of contract which conforms . . ." to the decision.[6/] Thus this decision will affect few other litigants; it will have no future effect on the petitioners or other prudent creditors who have adjusted their contract forms.[7/]

Nor is the impact of the Seventh Circuit's ruling herein severe in terms of the amount of damages. The award to the respondents below was $639.68 each, or a total of $1279.36. This extremely small damage award, when considered with the narrowly circumscribed applicability of the decision below and the limitations of this Court's resources, dictate that the petition for certiorari be denied.

2. THE CURRENT REGULATION Z DEFINITION OF "SECURITY INTEREST" COMPELS THE FINDING THAT A CREDITOR'S INTEREST IN RETURNED OR UNEARNED PHYSICAL DAMAGE INSURANCE PREMIUMS IS A TILA SECURITY INTEREST

Respondents adopt the reasoning set forth in the Seventh Circuit opinion in this cause for support of the conclusion that the failure of the petitioners to disclose the interest retained in unearned or returned insurance premiums as a security interest violates the TILA (Pet. A. 1-14).

6/ Petition for Rehearing at 8. See also A. 16-17, an example of the modified Ford Credit contract. This contract belies the argument of the petitioners that the decision below will require a lengthy disclosure that would frustrate the purposes of TILA; the new Ford Credit contract simply follows the format originally suggested in Gennuso v. Commercial Bank & Trust Co., supra, at 442, n. 17, and is actually more succinct than the form contract in this case.

7/ As noted by the court below, the petitioners could have avoided liability in the first instance by complying with the decision in Edmondson v. Allen-Russell Ford, Inc., supra: "Ford was gambling that its view of the law would prevail over the Edmondson view in subsequent suits." Valencia v. Anderson Bros. Ford, supra (Pet. A. 20).

3. THE TENTH CIRCUIT DECISION IN JAMES V. FORD MOTOR CREDIT COMPANY IS ERRONEOUS.

The decision of the Tenth Circuit in James v. Ford Motor Credit Company, supra, contradicts decisions in four other circuits and is plainly erroneous. The James opinion rests solely on the Simplification Act, an amendment to the TILA which has yet to become effective. The court ruled that the Simplification Act would not require a creditor to disclose any interest retained in unearned insurance premiums. In a per curium denial of a petition for rehearing, the court explained its ruling as being grounded on the belief that "the 1980 [Simplification] Act reflects an interpretation by Congress of the earlier [TILA] Act and is entitled to great weight." A. 15.

This is fundamentally wrong for the Truth in Lending Simplification and Reform Act, as the title confirms, represents a significant change in the law, a break with the prior legislation. The fact that the Simplification Act constitutes a major alteration of the TILA and a shift in congressional goals is clearly evidenced by the legislative history accompanying the new amendments:

> Title V simplifies and reforms truth-in-lending in four general areas: (1) it provides the consumer with simpler, more understandable information; (2) it makes compliance easier for creditors; (3) limits creditor civil liability for statutory penalties to only significant violations; and (4) it strengthens administrative restitution enforcement of the act. S. Rep. No. 96-368, 96th Cong., 1st Sess. 17 (1979).

Since the Simplification Act marks an attempt by Congress to change the current TILA, it is improper to attribute the current congressional goals and purposes to the framers of the TILA legislation which governs the 1977 transaction here under scrutiny. The legislative history indicates that Congress desired to alter the focus and requirements of the

TILA. As a consequence, the Simplification Act provides no standard for measurement of a 1977 consumer credit transaction.

Furthermore, the James decision constitutes a retroactiye application of the Simplification Act. Yet the fact that Congress intended no retroactive effect is evident in the legislation; the Simplification Act is not effective until April 1, 1982. Simplification Act, Section 625.(a). Judge Doyle dissented in James for this reason:

> Even if the [Simplification Act] legislative history would call for a different result, it should not be applied here in a retroactive way. James v. Ford Motor Credit Company, (Pet. A. 58) (dissent).

Finally, federal law specifically states that statutory amendments or repealing legislation

> shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability . . . 1 U.S.C. §109.

The Simplification Act does not provide for the extinguishment of liability for TILA violations occurring prior to its effective date. By virtue of 1 U.S.C. §109 then, the respondents' liability is not altered by the enactment of the TILA amendments. See DeLaRama S.S. Co. v. U.S., 344 U.S. 386 (1953).

The decision in James is premised on an erroneous view of the applicability of the Simplification Act. The Eighth Circuit, in a recent decision involving the same issue as is raised in this case, rejected the notion that the Simplification Act governs credit transactions entered into prior to its effective date. Murphy v. Ford Motor Credit Company, supra, at A. 9. In light of the erroneous conclusion of law in James and the limited applicability of the current TILA, this Court should deny the petition for certiorari.

4. LIMITING THE DECISION BELOW TO PROSPECTIVE APPLICATION ONLY IS UNWARRANTED.

Petitioners argue that this case is one in which this Court should take the highly unusual position of giving its ruling prospective application only. Prospective-only application of a judicial decision is uncommon; litigants attempting to overcome the presumption of retroactive application must satisfy the heavy burden articulated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which sets out three factors, all of which must be met in order to trigger solely prospective application of a decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding or nonretroactivity." Id. at 106-07 (citations omitted).

A. A Decision For Respondents In This Case Was Clearly Foreshadowed.

The decision below did not overrule clear past precedent; rather, it was consistent with the rulings of the Third and Fifth Circuits in Gennuso v. Commercial Bank & Trust Co., supra, and Edmondson v. Allen-Russell Ford, Inc., supra. Even at the time of the consummation of the credit transaction which underlies this controversy, two federal district courts had issued rulings consonant with the decision of the court below.[8/] Edmondson v. Allen-Russell Ford, Inc., C75-940 A (N.D. Ga.

8/ At that time only one district court had concluded that such an interest was not a TILA security interest. Shanks v. Greenbriar Dodge, Inc., Civ. No. C75-1154A (N.D. Ga. 1976), revs'd, 577 F.2d 296 (5th Cir. 1978).

April 29, 1976, aff'd, 577 F.2d 291 (5th Cir. 1978); Gennuso v. Commercial Bank & Trust Co., 425 F. Supp. 461 (W.D. Pa. 1976), revs'd on other grounds, 566 F.2d 437 (3rd Cir. 1977). Moreover, in 1970, long before the instant credit transaction, the Federal Reserve Board issued Staff Opinion No. 377, [1969-1977 Sp. Rel. Transfer Binder] Cons. Credit Guide [CCH] Par. 30, 555 (July 22, 1970) which requires creditors to disclose as a TILA security interest the interest retained in unearned insurance premiums. This staff opinion should have provided the petitioners ample guidance; under this Court's recent decision in Ford Motor Credit Company v. Milhollin, __U.S.__, 100 S.Ct. 790 (1980), the staff opinion merits the deference of this Court and "should be dispositive" of the instant case. Id. at 797.

Furthermore, petitioners' claim that the decision below upsets an industry-wide form of disclosure, Pet. at 7, 16, is erroneous. This contention is not supported by the record and is belied by Bulger v. Thorpe Credit Inc. of Illinois, 609 F.2d 1255 (7th Cir. 1979), where the facts showed that a 1976 Illinois credit transaction included a "disclosure statement [that] reveals a security interest in [H]ousehold Goods, Appliances, Furniture and all unearned credit insurance premiums' . . ." Id. at 1257. (emphasis supplied). It is thus apparent that long before the credit transaction in the instant case members of the credit industry were routinely disclosing security interests retained in insurance premiums. In fact, since Gennuso v. Commercial Bank & Trust Co., supra, Ford Credit has been virtually the only creditor continuing to litigate this issue in an effort to deny consumers this information. See Murphy v. Ford Motor Credit Company, supra; James v. Ford Motor Credit Company, supra; and Edmondson v. Allen-Russell Ford, Inc. and Ford Motor Credit Company, supra. Petitioners' contention that the decision sub judice overturns a uniform industry practice of non-disclosure is thus without merit.

B. Limiting This Decision To Prospective Application Will Frustrate The Operation Of The Truth In Lending Act

Petitioners argue that the normal application of the lower court's decision would not aid in effectuating the goals of the TILA. Yet Congress' primary objective in the TILA, the meaningful disclosure of credit terms and costs enforced through civil litigation, would be frustrated by only prospective applications of TILA decisions. It would permit creditors to omit disclosures with impunity, knowing that their past violations of the law would go unmolested. In Travis v. Trust Company Bank, 621 F.2d 148 (5th Cir. 1980), the Fifth Circuit recently rejected a creditor's attempt to have a prior TILA decision applied prospectively only pursuant to Chevron Oil; the court held that a normal retroactive application of TILA decisions would further the legislative goals of the Act. Id. at 151. See also Brown v. Termplan, Inc., 459 F. Supp. 160, 162-63 (N.D. Ga. 1978).

C. No Substantial Inequitable Results Would Occur If This Decision Is Given Normal Application.

The last factor to be considered under Chevron is whether inequity would result from retroactive application. Petitioners have not substantiated any inequitable consequences of the application of the Seventh Circuit decision. In fact, the ruling in this case reflects that the petitioners continued to use in this jurisdiction, a form contract which the Fifth Circuit expressly held to violate federal law on July 28, 1978. Edmondson v. Allen-Russell Ford, Inc., supra. (Pet. A. 20). Had Ford Credit modified its contract to conform with the Edmondson decision shortly thereafter, it would not be facing any liability whatsoever for violation of Regulation Z, except for respondents herein, in that the TILA's one year statute of limitations would have already run. 15 U.S.C. §1640(e). It is preposterous for the petitioners to perpetuate the use of an illegal disclosure form, thereby increasing

the number of consumers who have had their rights violated under the TILA, and then attempt to rely on the increased exposure to liability as a justification for this Court to exercise an equitable power of refusing to apply its decision retroactively. See Travis v. Trust Company Bank, supra at 151. The inherent inequity of this position is obvious. The Seventh Circuit concluded similarly: .

> . . . Ford was gambling that its view of the law would prevail over the Edmondson view in subsequent suits. The fact that Ford now faces the consequences of losing its conscious gamble hardly presents a case of inequitable hardship . . . The Chevron Oil doctrine is not directed at insulation of litigants from the consequences of their conscious business decisions; rather, its purpose is to avoid the hardship which can result from retroactive application of decisions which represent sudden, unexpected shifts in the law. This is not such a case. (Pet. A. 20-21).

Finally, none of the courts which have previously addressed the issue decided in this action have deemed it prudent to apply their decisions prospectively only. Petitioners rely on McDaniel v. Fulton Nat'l. Bank, 571 F.2d 948 (5th Cir. 1978) as support for a prospective application of the decision. However, McDaniel involved a situation where the Fifth Circuit in banc reversed a holding it had made less than two years before. See Martin v. Commercial Securities Co., 539 F.2d 521 (5th Cir. 1976). The court gave its new ruling only prospective application to insulate creditors who had relied on the prior decision. It is noteworthy too that the Fifth Circuit did not feel so constrained in the Edmondson decision, where its ruling that an interest in unearned insurance premiums is a security interest was not given only prospective application. See also Murphy v. Ford Motor Credit Company, supra.

As indicated above, the ruling of the court below was consistent with the overwhelming weight of prior authority, and thus did not constitute the departure from earlier authority required by Chevron Oil.

Moreover, a normal retroactive application of the decision will advance the goals of TILA without causing inequitable harm to the petitioners. Petitioners have therefore failed to satisfy the Chevron standards.

5. UNDER THE FACTS OF THIS CASE THERE IS NO SPLIT IN THE CIRCUITS ON THE APPLICATION OF RULE 13(a) BECAUSE RESPONDENTS' TILA COMPLAINT AND FORD CREDIT'S DEBT COLLECTION COUNTERCLAIM INVOLVE DIFFERENT ISSUES OF FACT AND LAW AND ARE SUPPORTED OR REFUTED BY COMPLETELY DIFFERENT EVIDENCE. THEREFORE, THE COUNTERCLAIM IS NOT COMPULSORY AND WAS PROPERLY DISMISSED FOR LACK OF JURISDICTION.

A. The Purpose And Test Of Rule 13(a).

Respondents' action is based on petitioners' violation of the TILA by failing to make required disclosures before the consummation of the contract. Ford Credit filed a counterclaim to collect sums allegedly due on the contract. The counterclaim admittedly has no independent federal jurisdictional basis and therefore, may not be asserted unless it is a compulsory counterclaim under FRCP 13(a). Beach v. KDI Corporation, 490 F.2d 1312, 1319 (3rd Cir. 1974).

The purpose of Rule 13(a) is to conserve judicial time and energy by avoiding a multiplicity of suits where the matters logically may be tried together. Southern Construction Co. v. Pickard, 371 U.S. 57, (1962). Rule 13(a) must be considered and applied in light of the "fundamental precept that federal courts are courts of limited jurisdiction," and must not be evaded. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374, (1978).

In order to meet the purpose of the Rule to avoid duplicative trials and still maintain the fundamental precept of limited jurisdiction, a counterclaim will be deemed compulsory only if it has a "logical relationship" with the initial claim. Moore v. New York Cotton Exchange, 270 U.S. 593 (1926). The logical relationship test has been defined in Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961) as follows:

> [A] counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience of economy require that the counterclaimant be permitted to maintain his cause of action.

B. The Facts Of This Case Show That There Is No Logical Relationship Between The Respondents' Complaint And Ford Credit's Counterclaim And Judicial Economy Would Not Be Served By Trying The State Law Counterclaim With The Federal Claim.

A comparative analysis of the issues and evidence pertaining to the claim and counterclaim shows that they involve different issues of fact and law and are supported or refuted by completely different evidence. The counterclaim is, therefore, not compulsory.

1. Respondents' TILA Claim.

Respondents alleged a violation of the TILA because of the failure of the petitioners to properly disclose the security interest they retained in returned insurance premiums. The only fact necessary to prove this claim is the contract itself. The respondents' claim presented no contested factual issues and was decided on cross motions for summary judgment.

2. Ford Credit's Counterclaim.

In its counterclaim Ford Credit prayed for an alleged outstanding contract balance and delinquency charges of 5% of each unpaid installment as of the date of judgment. Among the issues of fact and state law presented by the counterclaim which are wholly unrelated to respondents' TILA claim are:

(a) whether the contract was properly rescinded;[9/]

(b) whether there was a default under the contract;[9/]

(c) whether Ford Credit has complied with the provisions of the Illinois Commercial Code, Ill.Rev.Stat. ch. 26, §9-501, et seq., regarding repossession and sale of the automobile.[9/]

9/ The evidence that would be submitted regarding these issues is set out in the Statement of Facts, supra.

(d) whether Miguel Gonzalez is a buyer or a guarantor of the contract;10/

(e) if Gonzales is a guarantor, whether Ford Credit has pursued all collection procedures against Valencia as required by Ill.Rev.Stat. ch. 121-1/2, §578; 10/

(f) whether Ford Credit may collect late charges on installments no longer due because of acceleration of the debt.11/

Ford Credit's counterclaim is in turn subject to counter-counterclaims by respondents, particularly an action for damages under §9-507, of the Illinois Commercial Code based upon violations of §9-504 with regard to the repossession sale. This claim was not originally pleaded

10/ Ford Credit's counterclaim is against both Olga Valencia and Miguel Gonzalez. Ms. Valencia was the purchaser of the automobile and Mr. Gonzalez, her brother-in-law, was a co-signer or guarantor. Mr. Gonzalez did not receive the automobile. Ill.Rev.Stat. ch. 121-1/2, §578, defines a co-signer as a person who does not receive the automobile in question. That section further provides that a co-signer may be held liable only if he, in addition to signing the contract, signs a separate instrument which sets out the obligations of a guarantor. Gonzalez did not sign this form and, therfore, cannot be liable. Furthermore, under §578, even had Gonzales signed the guarantor form he could not be held liable until Ford Credit has first pursued its case against Valencia; the primary obligor and the guarantor cannot be sued simultaneously in the same lawsuit. Ford Credit's counterclaim thus raises factual issues of the status of Gonzalez and the legal issue of the effect of §578 on Ford Credit's counterclaim.

11/ This raises a state law issue o first impression. Ford Credit is asking for judgment on both the accelerated balance of the debt and late charges on payment not scheduled to be made until the acceleration. Section 18 of the contract allows Ford Credit to declare the entire contractual balance to be immediately due and payable. Exercise of this acceleration clause eliminates all future payments under the contract and makes the entire balance due and payable immediately. Ford Credit accelerated the debt in early March, 1978, when it sent the respondents the notice of repossession. In the first prayer for relief in its counterclaim, Ford Credit has requested judgment for the accelerated balance. Ill.Rev.Stat. ch. 121-1/2, §571, provides that "Only one delinquency and collection charge may be collected on any installment regardless of the period during which that installment remains in default." Ford Credit's counterclaim specifically requests judgment for "delinquency charges or five per cent of each unpaid installment for each unpaid installment as of the date of judgment". The counterclaim specifically mentions installments allegedly due on April 2, May 2, and June 2, 1978, as having been unpaid and in default. Ford Credit is thus asking for late charges on installments that are due after acceleration. §571 authorizes late charges only on late payment of "installments". The act of acceleration eliminates the installment payments and prohibits the creditor from obtaining a late charge on any installment that is no longer due because of the acceleration. Even if the accelerated balance itself may be considered an "installment", only one late charge may be imposed against it (by the specific terms of §571). Thus, under this statute, at best, Ford Credit was entitled to only one late charge of $5.00 after acceleration.

by respondents because, like Ford Credit's counterclaim, it has no independent federal jurisdiction and is not subject to the Court's pendent jurisdiction.

C. When The Facts Of The Cases Involving The Issue Of Compulsory Counterclaims Are Considered, There Is No Split Among The Circuits.

Ford Credit claims there is a split in the circuits on the compulsory counterclaim issue. In making its assertion, Ford Credit looks only to the ultimate rulings that the counterclaim is compulsory or permissive. In its petition, Ford Credit totally ignores the facts set forth above and the facts of the other decisions.

In referring to the logical relationship test, one commentator has noted that "The hallmark of this approach is its flexibility. Basically, it allows the court to apply Rule 13(a) to any counterclaim that from an economy or efficiency perspective could be profitably tried with the main claim." 6 Wright and Miller, Federal Practice and Procedure, §1410, at 47 (1971). This flexible approach has been followed by the courts faced with the issue of whether a debt collection counterclaim is compulsory to a TILA claim. The determinative factors are the legal and factual issues raised by the counterclaim. Where the counterclaim raised few additional legal issues and required the proof of only a few additional facts, the counterclaim has been held compulsory. Where the counterclaim raised numerous legal issues that would have required proof of an extensive set of facts not required for determining the original TILA claim, the counterclaim has been dismissed for lack of jurisdiction. There is no irreconcilable difference in these decisions.

After considering the facts set above, the Seventh Circuit in this case affirmed the dismissal of Ford Credit's counterclaim because:

> The TILA claim and debt counterclaim raise different legal and factual issues governed by

> different bodies of law. A TILA suit for inadequate disclosure, such as the instant case, can often be resolved by an examination of the face of the loan document. A debt counterclaim, on the other hand, can raise the full range of state law contract issues. The two claims do not, as the Fifth Circuit held, spring from the same 'aggregate of operative facts'. Plant, supra, 598 F.2d at 1361. The rights and obligations of the parties with respect to the two claims hinge on different facts and different legal principles. (Pet A. 24).

Other courts that have held debt collection counterclaims to be permissive, have stressed, after considering the specific facts of the case before them, the great disparity between the legal, factual and evidentiary issues between the TILA claim and the debt collection counterclaim. See, Whigham v. Beneficial Finance Company, 599 F.2d 1322 (4th Cir. 1979); Gammons v. Domestic Loans of Winston-Salem, Inc., 423 F. Supp. 819 (M.D.N.C. 1976); and Zeltzer v. Carte Blanche Corp.; 414 F. Supp. 1221 (W.D. Pa. 1976).

Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419 (5th Cir., 1978), involved the converse situation; whether a TILA counterclaim is compulsory to a debt collection claim.[12/] The Fifth Circuit held the counterclaim to be permissive because "although it arises from the contract transaction, the Truth-in-Lending Act claim involves entirely separate questions of law and fact from those dealing with the producers' liability on their accounts." 581 F.2d at 430.

Courts that have held debt collection counterclaims compulsory to a TILA action have stressed the similarity of the legal and factual issues present in those particular cases. See, Carter v. Public Finance Corp., 73 F.R.D. 488 (N.D. Ala. 1977); McMillon v. Blazer Financial Services, Pov. L. Rep. Par. 22,720 (N.D. Ga. 1976).

12/ The TILA claim was time barred unless it could be asserted as a compulsory counterclaim and relate back to the date the complaint was filed. Thus, it had no independent federal jurisdictional base.

Ford Credit claims a split in the circuits because of the decision of the Fifth Circuit in Plant v. Blazer Financial Services, Inc., of Ga., 598 F.2d 1357 (5th Cir. 1979). However, the Plant court held the debt collection counterclaim to be compulsory in that case because:

> We conclude that the obvious inter-relationship of the claims and rights of the parties, coupled with a common factual basis of the claims, demonstrates a logical relationship between the claim and counterclaim . . ." Id. at 1364

The Fifth Circuit in Plant also acted under the mistaken belief "that the vast majority of debt actions pose issues of fact and are handled on summary judgment". Id. at 1362. In the case at bar, the TILA claim was decided on summary judgment whereas an extensive trial would have been necessary for the counterclaim.

Also the court in Plant reached an erroneous conclusion of law in holding that "A determination that the underlying debt was invalid may have a material effect on the amount of damages a debtor could recover on a Truth-in-Lending claim." Id. at 1364. See, Basham v. Finance America Corp., 583 F.2d 918, 927-28 (7th Cir. 1978). In the case at bar, the fact that the automobile's sales transaction was revoked has no bearing on the amount of statutory damages provided for in the Act.

Finally, in Plant the Fifth Circuit did not overrule its prior contrary decision in Spartan Grain & Mill Co. v. Ayers, supra. Instead, the Plant court distinguished Spartan Grain by noting that the latter case "arose in a procedural setting opposite from this action". Plant v. Blazer Financial Services, Inc., supra, at 1360.

D. The Effect Of A State Law Issue of First Impression In The Counterclaim.

As noted above, Ford Credit has raised the issue of whether late charges may be imposed on installments no longer due because of accele-

ration in its counterclaim. This is a state law issue of first impression and raises significant legal issues concerning the construction of a state statute which has never been interpreted by an Illinois appellate court.

Such state law issues should not be decided by a federal court when the federal defendant could bring its entire counterclaim as an affirmative action in state court. In United Mine Workers v. Gibbs, 383 U.S. 715, (1966), this Court noted that:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a sure-footed reading of applicable law. Id. at 726

Indeed, if Ford Credit's counterclaim is compulsory, the district court would have to abstain under Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941), and remand the case to the state courts for an interpretation of state law.

E. Dismissal Of The Counterclaim is Not Unfair To Ford Credit.

Ford Credit claims that dismissal of the counterclaim is unfair to it because it will have to satisfy the TILA judgment "before it can obtain a state court judgment in its favor in the amount of the unpaid loan". This contention must be rejected for several reasons.

First, from the record in this case it appears that the counterclaim was asserted by Ford Credit for purposes of delay in order to avoid prompt payment of the TILA judgment entered by the trial court. As indicated above, the respondents have several defenses to Ford Credit's counterclaim. It is unlikely that Ford Credit will ever prevail on its action. The sequence of events set forth in the record indicates that Ford Credit concurs in this result. According to the counterclaim the respondents defaulted on their contract on November 2,

1977. Ford Credit could have filed suit for the entire accelerated balance at any time thereafter. Ford Credit failed to take any action for seven months thereafter until it filed its counterclaim. During that time, on December 2, 1977, the petitioners were given written notice by Valencia that she had revoked acceptance of the car. Ford Credit thus knew at that point that the respondents were not going to make any payments on the automobile and by its calculations were now two payments in default. Still Ford Credit took no action for over six months. Under §9-507 of the Illinois Commercial Code, Ford Credit was required to act in a commercially reasonable manner and thus to quickly dispose of the collateral. Yet Ford Credit failed to act, delaying another three months before filing its present counterclaim.

From the above facts, it appears that Ford Credit had no intention of bringing suit against the respondents. However, once the respondents had filed this action Ford Credit filed its debt collection counterclaim knowing full well that extensive legal issues were present and that an evidentiary trial on the merits would be necessary. It is not the purpose of Rule 13 to allow defendants to significantly delay the final resolution of all issues in federal court.

Second, Ford Credit's argument assumes that it could obtain a judgment on its counterclaim in federal court faster than it could obtain a judgment on a separate action filed in state court. Such an assumption is unwarranted. Respondents' action was filed on May 3, 1978. Final judgment was entered in favor of the respondents on their claims over a year later on June 15, 1979. It is extremely likely that had Ford Credit filed its case in state court a final decision would have been rendered before June 15, 1979. The Circuit Court of Cook County is divided into numerous divisions; there are certain courtrooms that hear

only deficiency and contract actions. The great majority of cases assigned to those courtrooms are fully determined in less than a year.

Third, a check of the plaintiffs' index in the Municipal Department of the Circuit Court of Cook County for 1978, shows that Ford Credit filed 124 contract cases that year. The state court is thus the forum that Ford Credit regularly uses for its debt collection claims. Requiring them to file their debt collection claim in this case in state court would result in no prejudice to Ford Credit.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

_____

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1822
No. 79-2061

Thaddeus S. Murphy, Appellee, v. Ford Motor Credit Co. and Hilltop Lincoln Mercury, Inc., Appellants, Thaddeus S. Murphy, Cross-Appellant, v. Ford Motor Credit Co. and Hilltop Lincoln Mercury, Inc., Cross-Appellees.	*	Appeals from The United States District Court for The Eastern District of Missouri, Eastern Division

Submitted: May 20, 1980
Filed: August 28, 1980

Before HENLEY and McMILLIAN, Circuit Judges, and ROY*, Judge.

*The Honorable Elsijane T. Roy, Judge, United States District Court for the Eastern and Western Districts of Arkansas, sitting by designation.

ROY, District Judge.

This appeal is brought by Ford Motor Credit Corporation ("Ford") and Hilltop Lincoln Mercury ("Hilltop") from a decision in the District Court[1] in favor of the plaintiff, Thaddeus Murphy ("Murphy"), on an allegation of a violation of the Consumer Credit Protection Act. This Act is known as the "Truth In Lending Act" (TILA), and is found at 15 U.S.C. §§ 1601, et seq. TILA has been translated into regulations by the Federal Reserve Board, those regulations being in the form of "Regulation Z", found at 12 C.F.R. §§ 226.1, et seq. Those portions of TILA and Regulation Z which are at issue herein are 15 U.S.C. § 1638(a)(10) and 12 C.F.R. § 226.8(a)(1)(b)(5) which relate to the disclosure of security interests created in favor of lenders.

Jurisdiction in District Court was predicated on 15 U.S.C. § 1640(e) and in this Court is based on 28 U.S.C. §§ 1291 and 1294.

In the trial court, Murphy alleged that appellants failed to disclose the identity of Ford as a creditor, failed to identify all of the property to which the security interests related, failed to disclose the right to accelerate on default, failed to put all required disclosures on the same side of the page, failed to put the required disclosures in meaningful

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[1]The Honorable Roy W. Harper, Judge, Eastern District of Missouri, Eastern Division.

sequence, and failed to provide Murphy and his co-signer with a written disclosure statement. Murphy prevailed only on the allegation that the security interest created in favor of Ford by the assignment of any returned or unearned insurance premiums was not disclosed as such security interests are required to be by the Act. Appellants brought this appeal, alleging that the assignment of the premiums did not amount to a security interest and that the District Court erred in that determination. Murphy filed a cross-appeal based on the amount of attorney's fees which was awarded, claiming that $500.00 was insufficient.

The section of the installment sales agreement which is the subject of this appeal stated, on the back of the instrument:

> The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interest of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require . . . .
>
> Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller is hereby authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of the Seller.

The District Court, relying on *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S.

951 (1979), held that the assignment of insurance premiums was a security interest as contemplated by 15 U.S.C. § 1638(a)(10) and that appellants' failure to disclose it as such constituted a violation of TILA.

The facts indicate that in March of 1978 Murphy purchased from Hilltop a 1977 Lincoln automobile. Murphy paid $1,300.00 as a down payment and financed the remainder. Murphy signed a retail installment loan contract for the amount remaining, and it was understood that the actual financing would be arranged through Ford.

Appellee filed this action against the appellants and at the close of the trial, the court found that the Act had been violated by both appellants and imposed the maximum statutory damages of $1,000.00 and awarded Murphy $500.00 for attorney's fees.

The issues presented by this appeal are, first, whether the District Court erred in its conclusion that the assignment of returned or unearned insurance premiums was a security interest which was required to be disclosed as such on the face of the contract or on the disclosure statement; and, second, whether the District Court abused its discretion in the award of attorney's fees of only $500.00 in light of the attorney's testimony that he spent 49.7 hours in preparation for and participation in the trial.

At the outset we note that three other circuit courts have determined that the assignment of unearned or returned insurance premiums in a retail installment contract does

amount to a security interest and should be disclosed as such. *Valencia & Gonzalez v. Anderson Bros. Ford, et al,* _____F.2d ____ (7th Cir. Mar. 20, 1980); *Edmondson v. Allen-Russell Ford, Inc., supra; Elzea v. National Bank of Georgia,* 570 F.2d 1248 (5th Cir. 1978); *Gennuso v. Commercial Bank & Trust Co.,* 566 F.2d 437 (3d Cir. 1977). However, the Tenth Circuit, to some extent, has held to the contrary. *James v. Ford Motor Credit Co.,* ____F.2d ____(10th Cir. June 24, 1980), and *Hernandez v. O'Neal Motors, Inc.,* ____F.2d____(10th Cir. June 24, 1980).

15 U.S.C. § 1638(a)(10) requires that the retention or acquisition of any security interest by a creditor in a consumer transaction be disclosed. However, "security interest" is not defined in TILA; rather, Congress left that detail to the Federal Reserve Board which was charged with promulgating the regulations required for the implementation of the Act. In response, the Board formulated Regulation Z. "Security interest" is defined therein at 12 C.F.R. § 226.2(gg) as follows:

> . . . any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's,materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

The appellants admit, in their brief, that the purpose of the assignment clause, or one of the purposes, is to use those returned or unearned premiums to apply to the debt of the debtor for the car. Appellants argue that the amount of such premiums would not be enough to offset any substantial portion of the debt owed on a car. Nevertheless, the definition given in the pertinent clause of Regulation Z does create an interest on the part of the creditor which secures payment or performance of an obligation. Therefore, the arguments of the appellants must fail under the clear definition of security interests.

As stated in *Valencia & Gonzales, supra*, at p. 12 of the slip opinion:

> Application of the Regulation Z definition of "security interest" in this case, as in *Edmondson*, poses no special problems. It is not seriously disputed that the assignment of unearned insurance premiums confers on the creditor an interest in property. Even the defendants refer to the assignment as an "incidental interest in property." Brief of Appellants at 8. Whether incidental or not, we agree with the Fifth Circuit that such an assignment is an interest in property. 577 F.2d at 294. Similarly, we agree that this property interest secures the performance or payment of an obligation. The assigned premiums may be used, in the sole discretion of the creditor, to purchase replacement insurance coverage or to pay part of the debtor's indebtedness. *In either case, the assignment secures an obligation of the debtor. Id.* at 294. The Creditor has the

> authority to cancel the insurance and cause payment of the unearned premiums to itself at any time. The contract clearly gives the creditor an interest in property which secures performance of a debtor's obligation. Such an interest is by definition a security interest for TILA purposes. 12 C.F.R. § 226.2(gg), and as such must be disclosed. Defendants do not suggest that such disclosure was made in the contract before us. (emphasis supplied)

Herein, the appellants concede that the assignment creates an "interest" in favor of the lender, albeit "incidental." The purpose of the assignment is to secure the payment or performance of the debtor's obligation, however small the amount of the unearned or returned premiums might be. The application of the proceeds of the insurance, whether in the form of an indemnity or returned or unearned premiums, places the assignment squarely within the definition of a security interest under Regulation Z. Undeniably, the premiums would go to secure "payment or performance of an obligation," *i.e.*, the payment of the principal and interest of the amount of the loan to the debtor.

While we recognize that state law may be a factor in determining whether a security interest has been created in a given situation, an interest may, nevertheless, be a security interest for purposes of TILA even though it is not an enforceable security interest under state commercial law. *Valencia & Gonzalex, supra; Bulger v. Thorp Credit, Inc. of Illinois*, 609 F.2d 1255 (7th Cir. 1979). Appellants argue

that the assignment does not amount to a traditional security interest. However, the Federal Reserve Board's definition of a security interest is considerably broader than the concept of security interests in the Uniform Commercial Code.

The provisions of TILA and Regulation Z, as remedial legislation, are to be broadly construed in favor of the consumer in order to implement Congressional intent and purpose. *Griffith v. Superior Ford*, 577 F.2d 455, 457 (8th Cir. 1978); *Sellers v. Wollman*, 510 F.2d 119, 122 (5th Cir. 1975). The adoption of the Act in 1968 was premised on a Congressional finding that economic stabilization and competition in the credit industry would be promoted by the informed use of credit. 15 U.S.C. § 1601. The Congressional intent was to regulate disclosure in an industry which had previously been an example of the doctrine of *caveat emptor*. "Congress has determined that such purchasers are in need of protection." *Mourning v. Family Publication Service*, 411 U.S. 356 (1973).

In support of their position, appellants have directed this Court's attention to the new Truth in Lending Simplification and Reform Act of March 31, 1980. The legislative history to this Act states:

> The security interest disclosure is also simplified to eliminate the technical disclosure of the type of security interest taken. When a security interest is being taken in property purchased as part of the credit transaction, this section requires

> a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, the Committee intends this provision to require a listing by item or type of the property securing the transaction, but not a listing of related or incidental property. For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing in incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under or waived in accord with state law, accessions, accessories, or proceeds.
>
> Senate Committee Report, CCH Extra Edition No. 810, ¶ 2096 at 237.

However, this new Act does not take effect for two years from the date of its enactment (§ 625 of the Act), and the present action arises out of, and is controlled by, the existing Act.

We find the decisions of the Third, Fifth and Seventh Circuits to be logical and reasonable interpretations of the Act. In light of the reasoning of those decisions and the definition of "security interest" by the Federal Reserve Board, we feel compelled to resolve the issue herein in favor of the appellee.

Appellants have argued in the alternative that, if this Court affirms the District Court, the effect of the decision should be prospective, not retroactive, except as to the plaintiff.

The criteria for determining whether a decision should be given nonretroactive effect are contained in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, whether by overruling clear past precedent on which litigants may have relied, see, *e.g., Hanover Shoe v. United Shoe Machinery Corp., supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen v. State Board of Elections, supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra*, at 706.

See, also, *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969); *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (8th Cir. 1975); *Shea v. City of St. Paul*, 601 F.2d 345, 350-51 (8th Cir. 1979); and *Rudolph v. Wagner Electric Corp.*, 586 F.2d 90 (8th Cir. 1978).

We have reviewed the facts at bar in light of all of the *Chevron* principles. In particular, we note that appellants have not persuaded us that retroactive application of our ruling

will impede the operation of TILA or cause undue hardship or produce inequitable results. Thus, on balance we decline at this time to limit any retroactive effect our decision may have.

In his cross-appeal, Murphy has alleged that the trial court erred in awarding only $500.00 as attorney's fees in light of the evidence offered by the attorney that he spent 49.7 hours in preparation for and in the trial of the case. Murphy contends that the award should be for $3,727.50,[2] particularly since recovery was for $1,000.00, the maximum amount which can be awarded for a single violation.

Some of the guidelines for establishing a reasonable attorney's fee award are delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978). The test to be applied on appeal in reviewing the attorney's fee award is whether the trial court abused its discretion in setting the amount of the fee. *Weeks v. Southern Bell T. & T. Co.*, 467 F.2d 95 (5th Cir. 1972), *reh. denied* 471 F.2d 650 (1973).

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[2]This is based on a charge of $75.00 per hour.

We recognize that the trial court considered many of the factors relative to the attorney's fee award in this action, but his memorandum opinion does not address the issue of whether the award was adequate to encourage enforcement of the Truth In Lending Act. The record here shows that plaintiff's attorney filed a complaint, conducted discovery by both deposition and interrogatory, then obtained leave to amend the complaint over the defendants' opposition, filed an amended complaint, submitted proposed findings of fact and conclusions of law, tried the case, and filed both trial and post-trial briefs.

Congressional goals expressed in the provisions of the Truth In Lending Act include the creation of a system of private attorneys general to aid in effective enforcement of the Act. *Soso v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974); *Postow v. OBA Federal Savings & Loan Association*, ____F.2d ____ (slip opinion June 18, 1980).

Accordingly, we deem it appropriate to remand the issue of the reasonableness of the attorney's fee award to the District Court for reconsideration as to whether the award is adequate to encourage meritorious enforcement actions under the provisions of the Act.

On this appeal, Murphy shall be awarded an attorney's fee of $600.00 and also his appeal costs.

Affirmed in part and remanded in part for reconsideration of attorney's fees as indicated.

HENLEY, Circuit Judge, dissenting in part.

I find no abuse of discretion in the trial court's award of attorney's fee, and I dissent from so much of the opinion of the court as calls for remand for reconsideration of that award.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUL 21 1980

HOWARD K. PHILLIPS
Clerk

JODY JAMES and BARBARA JAMES,

Plaintiffs-Appellants,

v.

FORD MOTOR CREDIT COMPANY and DEL NORTE MOTOR COMPANY,

Defendants-Appellees.

No. 78-1806

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. Civ. 78-F-647)

Before SETH, Chief Judge, BREITENSTEIN, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

ON PETITION FOR REHEARING

The petition for rehearing is denied. The petitioners-appellants object to the consideration which the court gave to the March 31, 1980, "Trust in Lending Simplification Act" and its legislative history. The Supreme Court has said that when two acts are in pari materia, the later act can be "regarded as a legislative interpretation of the earlier." United States v. Stewart, 311 U.S. 60, 64. In Regents of the University of California v. Bakke, 438 U.S. 265, 349, the separate opinion of four Justices says: "We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute."

The 1968 and 1980 acts related to the same subject matter, "Truth in Lending." We are convinced that the 1980 Act reflects an interpreation by Congress of the earlier act and is entitled to great weight. The effect is that Congress in passing the 1968 act did not intend to impose a civil penalty for the type of nondisclosure claimed by the appellants.

Judge Doyle would grant the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ACCT NO. _____

ILLINOIS AUTOMOBILE RETAIL INSTALLMENT CONTRACT

DATE 3/2/80

Buyer (and Co-Buyer)-Name and Address (Include County and Zip Code)

[redacted]

"Buyer" means all persons who sign this Contract as Buyer or Co-Buyer

CREDITOR
Seller-Name and Address
DEEL FORD, INC.
14800 S DIXIE HWY.
POSEN, ILLINOIS 60468

Assignee of Contract (See Assignment below): Ford Motor Credit Company, The American Road, Dearborn, Michigan 48121

The Buyer may buy the Vehicle described below for cash. The cash price is shown below in Item (1) "Cash Price". He may also buy the Vehicle on credit. The credit price is shown below in Item (10) "Deferred Payment Price". By signing this contract, the Buyer chooses to buy the Vehicle on credit under the agreements in this contract. **In this contract there is no promise as to the merchantability, suitability, or fitness for purpose of the Vehicle.** The Buyer may receive a separate warranty on the Vehicle.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck Ton Capacity	Vehicle Identification Number	Use For Which Purchased
NEW	1979 FORD	FIESTA	2 DOOR	4		GCFBWJ 607020	☒ Personal ☐ Agriculture ☐ Business ☐

INCLUDING:

☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐ _____

DESCRIPTION OF TRADE-IN:

1973 CADILLAC (Year and Make) 6D49R3Q 164239 (Serial Number) $ 1016.65 (Gross Allowance) $ N/A (Amount Owing)

ADDITIONAL PROVISIONS

A. Vehicle Ownership, Use and Care: The Buyer will take care of the Vehicle and will obey all laws in using it. The Buyer will not sell the Vehicle and will keep it free from the claims of other persons. The Buyer will use the Vehicle only in the state where he now lives unless the Creditor gives him written consent to use it in another state or unless his use of the Vehicle in another state is for no more than one month.

B. Vehicle Insurance: The Buyer will insure the Buyer and the Creditor against loss or damage to the Vehicle. The type and amount of insurance must be acceptable to the Creditor. The Creditor may buy the insurance if the Buyer does not, but the Creditor does not have to do so. If the Creditor buys the insurance, the Creditor may insure only the Creditor or both the Creditor and the Buyer. In either case, the Buyer must pay back to the Creditor what the Creditor pays for the insurance plus interest at the highest rate allowed by law. If the Creditor insures only the Creditor, the Buyer will not have insurance. Whether or not the Vehicle is insured, the Buyer must pay for it if it is lost, damaged or destroyed.

If a charge for insurance is shown below, the Creditor will try to buy the coverages checked for the term shown. The Creditor is not liable though if he cannot do so. If these coverages cost more than the amount shown for insurance, the Creditor may buy them for a shorter term or he may credit the Buyer for the amount shown for insurance. If the Creditor cannot buy any insurance, he will credit the Buyer for the amount shown for insurance. The credit will be made to the last payments due. If the Creditor does not buy the insurance, the Buyer must buy it.

☐ Comprehensive
☐ Fire-Theft & Combined Additional Coverage
☐ Towing & Labor Costs ($25.00 Limit)
☐ $ N/A Deductible Collision

Term: _____ Months $ N/A

The Buyer may choose the person through whom Vehicle Insurance is to be obtained.

DETAILS OF TRANSACTION

(1) **Cash Price**		$ 5796.65 (1)
Cash Downpayment	$ N/A	
Trade-In (Description above)	$ 1016.65	
(2) **Total Downpayment**		$ 1016.65 (2)
(3) **Unpaid Balance of Cash Price** (Item (1) minus (2))		$ 4780.00 (3)
(4) **Other Charges**		
Vehicle Insurance	$ N/A	
Credit Life Insurance	$ 185.96	
Credit Disability Insurance	$ N/A	
Official Fees	$ N/A	
Taxes (Not in Cash Price)	$ 15.00	
License ($ 5.00), Title ($ N/A), and Registration ($ N/A) Fees	$ 5.00	
SERVICE POLICY	$ 235.00	
_____	$ N/A	
_____	$ N/A	
Total Other Charges		$ 440.96 (4)
(5) **Unpaid Balance – Amount Financed** (Items (3) plus (4))		$ 5220.96 (5)
(6) **FINANCE CHARGE**		$ 1931.52 (6)
(7) **ANNUAL PERCENTAGE RATE** 16.4 % (7)		
(8) **Total of Payments** (Items (5) plus (6))		$ 7152.48 (8)

(9) **Payment Schedule:** The Buyer will pay the Total of Payments (Item 8) to the Creditor in 48 monthly payments. Each payment, except the last one, will be $ 149.01. The last payment will be $ 149.01. Payments are due on the 13 day of each month. The first payment is due on 3/13/80, 19 _____.

A.16 (cont.)

Liability insurance coverage for bodily injury and property damage caused to others is not included.

C. Credit and Other Optional Insurance:

(1) Credit Life Insurance by
INT REGENTED LIFE
on the life of [redacted]

This insurance is for the term of this contract and is explained in a notice or agreement given to the Buyer on this date. $ 155.94

(2) Credit Disability Insurance by

This insurance is for the term of this contract and is explained in a notice or agreement given to the Buyer on this date. $ N/A

(3) Other Optional Insurance
(Describe and specify term)

$ N/A

$ N/A

Credit Life Insurance, Credit Disability Insurance and Other Optional Insurance is not required by the Creditor and is not a factor in the Creditor's decision to approve this credit. Credit Life Insurance or Credit Disability Insurance may be cancelled from its inception within 15 days from the date hereof by written request from each Buyer and any Guarantor. Upon cancellation, the entire charge therefor shall be refunded or credited to Buyer.

The Buyer asks the Creditor to buy the insurance for which an amount is shown above.

Buyer Date 1/28/80

(Cost of insurance to be included only if signed by each insured Buyer and dated)

(10) Deferred Payment Price (items (1) plus (4) plus (6)) $ [illegible] (10)

(11) **Security Interest:** The Buyer gives the Creditor a security interest under the Uniform Commercial Code in the Vehicle, in all money or goods received for the Vehicle and in all insurance charges financed for the Buyer. This secures the payment of the monthly payments and all other amounts the Buyer now or later owes on this contract. It also secures the Buyer's other agreements in this contract.

(12) **Prepayment Rebate:** The Buyer may pay this contract in full at any time. If he does so, he will get a credit for the unearned part of the Finance Charge if it is **$1.00** or more. This credit will be figured on the sum of the digits method after first subtracting **$25.00.**

(13) **Late Charges:** The Buyer will pay a late charge on each payment not made within **10** days after it is due. The charge is **5** per cent of the part of the payment that is late, or **$5.00,** whichever is less. The Buyer also will pay any cost paid by the Creditor to collect any late payment. The Creditor's acceptance of any late payment or late charge does not excuse the Buyer's default or mean that the Buyer can keep making payments after they are due. The Creditor may accelerate the remaining payments and repossess the Vehicle, as explained below, if there is any default.

(14) **Default:** If the Buyer fails to make any payment when it is due, or if he fails to keep any other agreement in this contract, the Creditor may do either or both of the following:

a. **Acceleration of Payments:** The Creditor may require the Buyer to pay at once all remaining payments. The Buyer will receive a prepayment rebate as explained above when he pays.

b. **Repossession:** The Creditor may repossess the Vehicle. The Creditor may also take goods found in or on the Vehicle and hold them for the Buyer. If the Vehicle is taken back, the Creditor will send a notice to the Buyer. The notice will state that the Buyer may redeem (buy back) the Vehicle. It will also show the amount needed to redeem. The Buyer may redeem the Vehicle up to the time the Creditor sells it or agrees to sell it. If the Buyer does not redeem the Vehicle, it will be sold. The money from the sale, less allowed expenses, will be used to pay the amount still owed on this contract. Allowed expenses are those paid as a direct result of having to retake the Vehicle, hold it, prepare it for sale and sell it. Lawyers' fees and legal costs are allowed too. If there is any money left (a surplus), it will be paid to the Buyer. If the money from the sale is not enough to pay off this contract and costs, the Buyer will pay what is still owed to the Creditor, if allowed by law.

(15) **General:** Any change in this contract must be in writing and signed by the Buyer and the Creditor. The law of Illinois applies to this contract. If that law does not allow all of the agreements in this contract, the ones that are not allowed will be void. The rest of this contract will still be good.

Notice to the buyer.

1. **Do not sign this agreement before you read it or if it contains any blank spaces.**
2. **You are entitled to an exact copy of the agreement you sign.**
3. **Under the law you have the right, among others, to pay in advance the full amount due and to obtain under certain conditions a partial refund of the finance charge.**

Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

RETAIL INSTALLMENT CONTRACT

Buyer Signs [redacted] (Co) Buyer Signs [redacted]

Guarantor Signs [redacted]

I hereby guarantee the collection of the above described amount upon failure of the seller named herein to collect said amount from the buyer named herein.

Assignment: The Seller accepts this contract. If no other Assignee is named at the top of this contract the Seller assigns it to Ford Motor Credit Company under the Assignment on the back of this contract. If another Assignee is named, the Seller assigns this contract to the other named Assignee under the Assignment attached to this contract. When the Assignee buys this contract, it will be the Creditor.

Seller DEER FORD, INC. By [redacted] Title FINANCE MANAGER

NOTICE – ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.